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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 375.

GEORGE BRADEN, APPELLANT,

vs.

MORGAN TREAT, UNITED STATES MARSHAL IN AND FOR THE EASTERN DISTRICT OF VIRGINIA, ET AL., APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLANT.

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With permission of the court, I wish to supplement my brief by a few suggestions:

I.

The sixth amendment to the Constitution provides that "In all prosecutions, the accused shall enjoy the right to a "speedy and public *trial*, by an impartial jury of the *State* "and *district* wherein the crime shall have been committed, "which district shall have been previously ascertained by "law, and to be informed of the nature and cause of the "accusation; to be confronted with the witness against him; "to have compulsory process for obtaining witnesses in his "favor, and to have the assistance of counsel for his defense."

(*a*) I take it that it will not be questioned that this language is equivalent to a declaration that the accused shall not be tried in any court within whose jurisdiction the offense was not committed.

(*b*) When Mr. Braden was arrested in Richmond, Virginia, he insisted that this constitutional right of his should be protected and vindicated, and offered to show by evidence of himself and others that he had not committed any of the alleged offenses within the middle district of Tennessee. This right was denied by the court on the ground that the *indictment* declared that he *had* done so, and that the indictment was *conclusive* evidence of the truth of *its own* statement; therefore no evidence would be heard and the order of removal was made.

(*c*) Now it is said in this court that the most that can be said is that the lower court erred in its construction of section 1014, Revised Statutes, and that no constitutional question is involved.

It is further said that the error is not prejudicial, because all these questions can be tried in the court in which the indictment was found.

In other words, it is proposed to protect the appellant's constitutional right *against* trial in a district where he *did not* commit the offense, *by trying him there.*

(*d*) I wish to emphasize the point that the *only court* that could protect this constitutional right is the court in the jurisdiction in which the arrest was made, because if that court grants the warrant of removal, the next judicial step—assuming the case is not brought to this court as this one was—is the *trial* forbidden by the Constitution. Therefore it becomes the duty of the court in the jurisdiction *of arrest* to hear evidence upon the question of whether the accused did or did not commit the offense within the jurisdiction of the court in which the indictment was found.

(*e*) But it is said that the appellant not only offered to show that he did not commit the offense within the middle district of Tennessee, but that he had never committed the offense anywhere, and that this amounted to no more than a plea of "not guilty." But surely an accused does not imperil his *constitutional* right to be tried in the district in which he commits the offense, by adding to his offer to show that he did not commit the act alleged within whose jurisdiction the indictment was returned, but that he was innocent of having committed it at all. The two things are separate and distinct and the two different ideas embraced in the offer of proof are separate and distinct, raising separate and distinct questions, and should not be confused.

II.

It is said that the evidence offered, as shown by the avowal, was immaterial, because although the conspiracy alleged might have been formed in New York, yet if any one of the conspirators or an agent of any one of them had gone into the middle district of Tennessee, and there performed any act in furtherance of the object of the conspiracy, it rendered all of the conspirators indictable in the middle district of Tennessee, upon the ground that that overt act is a renewal of the conspiracy within that district.

Whether an overt act is necessary to complete the offense of conspiracy within the meaning of the Sherman Anti-Trust Act, or whether the offense is completed when the agreement is made, and at the place where the agreement is made, is a question fully dealt with in the principal brief; therefore I shall not in this connection discuss that question, but for the *purpose* of *this* argument only waive it.

What I wish to contend here is, that any act said to have been committed within the jurisdiction of middle Tennessee must be such an act as would be at least admissible in evidence upon the question as to whether or not a conspiracy

was formed or executed within the middle district of Tennessee.

For instance, to put a strong illustration, if A, B, and C should in New York conspire to burn down the house of D in Nashville, certainly evidence that an agent of A or that A himself, had sold to a party in Alabama ten tons of fertilizer would not be evidence even tending to show any act in furtherance of the conspiracy; and so I say here, the overt act alleged against the Federal Chemical Company, of which Mr. Braden is the president, must be of such a nature as would tend to show that it was carrying out the *object* of the conspiracy, which is alleged to have been for the purpose of destroying competition and enhancing the price of fertilizer. It must not be merely such an act as that company, in the ordinary course of business, must necessarily have performed, even if it had expressly refused to go into the conspiracy; but there should be in the indictment some averment that the fertilizer had been sold at the enhanced price agreed upon as the result of the conspiracy.

Now there are only two averments of specific acts against the Federal Chemical Company. These are:

(*a*) That the company, on December 28, 1903, at West Nashville, unlawfully did knowingly deliver to the Louisville and Nashville Railroad Company fifteen tons of the fertilizer merchandise consigned and to be shipped to one Walker at Athens, Alabama (Record No. 375, pp. 25, 26).

(*b*) That said Federal Chemical Company, on February 2, 1904, at West Nashville, unlawfully did knowingly deliver to the Nashville, Chattanooga and St. Louis Railway twenty tons of the fertilizer merchandise, consigned and to be shipped to the firm of Hendricks Bros. & McGavock at Athens, Alabama, (*Id.*, p. 26).

Now, the point I make is that the Federal Chemical Company, being lawfully engaged in the fertilizer business,

would be bound to make such shipments, whether it was a member, or had absolutely refused to be a member, of any conspiracy, and that the averments that these things were unlawfully done are mere conclusions and not substantive facts.

Taking, therefore, the averments in their broadest sense, they do not state *facts* which would be properly admissible as evidence to show that the alleged conspiracy was formed or attempted to be executed within the middle district of Tennessee, and therefore the matter stands as if the averment in the indictment had been that the agreement to conspire had been entered into by the conspirators within the middle district of Tennessee, without any attempt to aver any of the specific acts relied on as "overt acts."

Thus treating the matter, the bald question is presented whether the district judge erred in refusing to hear evidence to show that no such agreement was made within the middle district of Tennessee, and whether the Circuit Court erred in refusing to release the prisoner on *habeas corpus* when the same evidence was offered.

Respectfully submitted,

JAMES P. HELM,
Of Counsel for George Braden.